

November 17, 1958

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CONCORD, N.H.

Mr. James J. Barry
Commissioner
Department of Public Welfare
Concord, New Hampshire

Dear Mr. Barry:

This is in reply to your letter of November 5 regarding the OASI status of certain physicians rendering services to county charges at the Moore General Hospital in Grasmere. You state that with the exception of the anesthetist each of the doctors is paid a fixed amount per month for his services without regard to the number of visits made. Prior to July 1, 1958 the doctors were listed on the regular hospital pay roll, but since that time the practice has been for the doctors to submit regular monthly bills. You advise that no change in the amount of payment was involved and the billing procedure was installed in order to avoid liability on the part of the hospital in the event of malpractice by the doctors. You state that prior to July 1 the doctors were listed on wage reports submitted by Hillsborough County but that since July 1 they have not been reported.

It is necessary to determine whether these doctors are employees of Hillsborough County or whether they are independent contractors. If they are county employees they must be included in the wage reports, but if an independent contractor relationship is found to exist the doctors are not eligible to participate in the Old Age and Survivors Insurance Program. It is not surprising that you have found it difficult to resolve this question. The courts have encountered the same difficulty. In the Social Security Act an "employee" is defined as "(A)n individual who under the usual common law rules applicable in determining an employer-employee relationship, has the status of an employee". 42 USCA 410 (K)(2). "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done". Title 20 - Employees Benefits, Code of Federal Regulations, Sec. 404. 1004.

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This regulation (404. 1004. Title 20, CFR) also provides that "(I)ndividuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers and auctioneers engaged in the pursuit of an independent trade, business or profession in which they offer their services to the public are independent contractors and not employees."

In Willard Storage Battery Co. v. Carey, 103 F. Supp. 7 the foregoing excerpt was cited in support of a finding that physicians under contract with the company were independent contractors, not employees of the company. The Court relied upon the following considerations in arriving at this result:

- (1) Professional services requiring a high degree of skill were contracted for.
- (2) Direct control and supervision by the company over the details and means by which the work was to be accomplished was not contemplated, the contracts providing that the physicians were to use such methods as they saw fit in accordance with the best established practice.
- (3) The physicians were not as a matter of economic reality dependent upon the business to which they rendered service.
- (4) The physicians performed only part time service for the plaintiff company and during the years in question they maintained private practices, to which most of their time was devoted.
- (5) They were free to leave the company premises even during the hours they were scheduled to work if an emergency case in their private practice required their presence.
- (6) The compensation they received from the company was only a fraction of their total incomes during the years in question.

Our purpose in enumerating the factors considered by the Court in the Willard case is to illustrate the need for careful

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examination of all incidents of the relationship being considered. There is no simple, uniform and easily applicable test which can be used to determine whether persons doing work for others are employees or independent contractors. U.S. v. Aberdeen Aerie No. 24, 148 F2d 655.

The inadequacy of the common law control test in cases where the services rendered are of a professional nature has long been recognized. Larson's Workmen's Compensation Law s. 45.32.

The view of the United States Supreme Court with respect to difficulties often encountered in the application of the common law control test and its suggestion as to the principle to be invoked in doubtful cases is expressed in U.I.R.E. v. Hearst Publications, 322 U.S.111:

"That term (employee), like other provisions must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." (129).

In summary we advise that the common law rule establishing vicarious tort liability of an employer for the acts of his employee is of doubtful assistance in determining whether a physician in particular circumstances is to be considered as an "employee" for purposes of Old Age and Survivors Insurance. The inherent impracticability of controlling the details of the professional discretion of a physician is self apparent. Little doubt would seem to exist that a physician employed on a full time basis and rendering services exclusively on behalf of the employer would be eligible for OASI participation. It would seem, however, that unless under the agreement in question the physician is required to devote a substantial portion of his working day to the exclusive benefit of the individual in whose behalf the services are rendered and unless the compensation received is such as to constitute a substantial portion of his professional income that the purposes of the Social Security Act cannot be construed as contemplating participation.

We suggest therefore that you attempt to ascertain all aspects of the existing relationship between the County and the physicians. We would particularly suggest that you determine;

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(a) The exact nature of the agreement between the parties. Is it written or oral and in either case what are its terms.

(b) How much time do the doctors spend at the hospital.

(c) Are they free to come and go at will or are they required to keep exact hours.

(d) What reports if any are they required to file.

(e) Who is their immediate superior. What supervision does he exercise.

(f) Are the doctors furnished with offices at the hospital, and

(g) All other information which you believe will be of assistance in determining the extent to which the County demands the exclusive services of the physicians.

We regret that it has been necessary to indulge in such a protracted discussion of the principles involved but in the absence of "a simple, uniform and easily applicable test" this has been necessary. On the basis of the information contained in your letter we have considerable doubt as to whether a finding of the existence of an employment relationship could be sustained under the law. However, as previously indicated, we believe that it is incumbent upon you to acquire more comprehensive and detailed information as to the nature of the relationship. When this has been accomplished we will be in a position to review your decision as to the existence or non-existence of an employment relationship and to advise as to whether in our opinion such a finding can be sustained under the law.

Very truly yours,

Elmer T. Bourque
Assistant Attorney General

ETB/g